No. 19

No. [illegible]

[illegible]

Supreme Court of the United States.

[illegible]

Jeannie [illegible]
of the [illegible],
&c., [illegible].

[illegible]

IN ERROR TO THE [illegible] OF THE
[illegible]

BRIEF OF DEFENDANTS IN ERROR.

IRA J. WILLIAMS,
ALEX. SIMPSON, Jr.,
For Defendants in Error.

ARGUMENT FOR DEFENDANTS IN ERROR.

I. THE VALIDITY OF THE RETROSPECTIVE APPLICATION OF THIS STATUTE OF LIMITATIONS IS NOT INVOLVED, BECAUSE THE FULL BAR OF TWENTY-ONE YEARS' NON-DEMAND TOOK PLACE AFTER THE ACT.

The ground rent was created January 4th, 1854.

The Act of Assembly was passed by the Pennsylvania Legislature on April 27th, 1855.

This action was brought November 28th, 1896.

The non-demand which made the ground rent irrecoverable was for the period of twenty-one years and upwards immediately prior to bringing suit.

All of this period was *long after* the enactment of the statute.

Under such circumstances the Act is given no retrospective or retroactive effect.

Appellant's counsel concedes, as he must, not only that a valid Statute of Limitations could be enacted to apply to ground rents, but that a statute could be passed to apply retrospectively to ground rents created before its enactment. Under the facts in this case, if the Act is constitutional as to ground rents reserved after its passage, it is also constitutional as to this ground rent. If this suit had been brought in 1859, more than three years after the passage of the Act of 1855, and the defense had been made that there had been no demand by the plaintiff for arrears of ground rent for twenty-one years, or more, then the question as to the reasonableness of the period would have arisen. Applied to such a state of facts, the Legislature would, as to the time prior to the Act of 1855, have been making non-demand of interest evidence against the owner of the ground rent,

in a way in which it had not theretofore been. Applied to such a state of facts, it might properly have been said that the statute was retrospective or retroactive. But here plaintiff's failure to demand interest alleged to have been due was for more than twenty-one years *after the passage of the Act.* Plaintiff in respect of her failure to demand interest is on exactly the same footing as, and in no worse case than, the owner of a ground rent made in 1856, who had failed for twenty-one years prior to beginning suit to make demand for interest, or to secure his rights in the way required by the statute. The only reason why Statutes of Limitations may not in all cases be retrospectively applied, so as to include in the term or period prescribed therein the years of non-demand which have preceded the enactment of the statute, is that thereby, under the guise of barring the remedy, the contract itself would be impaired, because of the taking away of all remedy. If the Legislature provides that no action should be brought upon a ground rent upon which no demand had been made for twenty-one years, and there were such ground rents theretofore created, the holder of the ground rent would be absolutely without remedy, because twenty-one years having elapsed *prior to the passage of the statute*, no suit could be brought, if the Act were upheld. Where the statute is made retrospective, but it is provided that it shall not go into effect for a reasonable term of years thereafter, the statute, while it does disadvantage the owner of a ground rent, who had previously failed to make demand for a term of years, does not deprive him of his remedy, and hence does not impair the obligation of the contract. But no such question at all arises in this case. Plaintiff was not defeated below and will not be defeated here because her ground rent was dated prior to the Act of 1855, and failure had been made to make demand before that time. The date of the ground-rent deed here is immaterial. The reason that plaintiff cannot recover is that *no demand had been made for twenty-one years immediately prior to the commencement of this action.*

If any authority be necessary for so plain a proposition, it will be found in—

Koshkonong *v.* Burton, 104 U. S., 666 (1881).

Mr. Justice Harlan said:—

> "For, if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is therefore unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire Act would fall and become inoperative. The result, in such case, would be that the plaintiffs and other holders of the coupons would have not simply one year, but, under the construction we have given in force prior to the Act of 1872, to a reasonable time after its passage within which to sue. And if a proper construction of that Act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. *For this action was not instituted until more than eight years after the passage of the Act of 1872.* It is, consequently, barred by limitation as to all coupons falling due (and therefore collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the Legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But, neither upon principle nor authority, could that position be sustained."

Even if the period of three years allowed were unreasonable, plaintiff would have been obliged to bring suit within a reasonable time and could not now recover,

unless she can convince the court that forty-two years is a reasonable time.

II. A STATUTE OF LIMITATIONS MAY BE CONSTITUTIONALLY APPLIED TO PRIOR CONTRACTS WHERE, AS HERE, A REASONABLE TIME IS GIVEN AFTER THE PASSAGE OF THE STATUTE BEFORE THE BAR TAKES EFFECT.

In—

Terry *v.* Anderson, 95 U. S., 628 (1877),

Mr. Chief Justice Waite said:—

> "This court has often decided that Statutes of Limitation affecting existing rights are not unconstitutional, *if a reasonable time is given for the commencement of an action before the bar takes effect.* Hawkins *v.* Barney, 5 Pet., 457; Jackson *v.* Lamphire, 3 Pet., 280; Sohn *v.* Waterson, 17 Wall., 596 (84 U. S., XXI., 737); Christmas *v.* Russell, 5 Wall., 290 (72 U. S., XVIII., 475); Sturges *v.* Crowninshield, 4 Wheat., 122. And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of an action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain."

In—

Koshkonong *v.* Burton, 104 U. S., 675 (1881),

Mr. Justice Harlan said:—

> "It was undoubtedly within the constitutional power of the Legislature to require, as to the exist-

ing causes of action, *that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose.* The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect: Terry *v.* Anderson, 95 U. S., 633 (XXIV., 366); Hawkins *v.* Barney, 5 Pet., 457; Jackson *v.* Lamphire, 3 Pet., 280; Sohn *v.* Waterson, 17 Wall., 596 (84 U. S., XXI., 737); Christmas *v.* Russell, 5 Wall., 290 (72 U. S., XVIII., 475); Sturges *v.* Crowninshield, 4 Wheat., 122; Osborn *v.* Jaines, 17 Wis., 576; Parker *v.* Kane, 4 Wis., 1; Falkner *v.* Dorman, 7 Wis., 393."

In—

Turner *v.* People, 168 U. S., 89 (1897),

Mr. Justice Gray said:—

"It is well settled that a statute shortening the period of limitation is within the constitutional power of the Legislature, *provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect.* Terry *v.* Anderson, 95 U. S., 628, 632, 633 (24: 365, 366); *In re* Brown, 135 U. S., 701, 705-707 (34: 316, 318)."

In Saranac Land & Timber Co. *v.* Roberts, 177 U. S., 324 (1899), Mr. Justice McKenna, referring to the Turner case, said:—

"The decision establishes the following propositions:—

"1. That Statutes of Limitations are within the constitutional power of a State to enact.

"2. That the limitation of six months was not unreasonable."

The second proviso of the Act of 27th April, 1855, P. L., 368, is as follows:—

> "Provided that this section shall not go into effect until three years from the passage of this Act."

It is difficult to see why the time allowed, of three years, is not a reasonable one. Here the plaintiff would have been in no better case, if the statute had enacted that it should not go into effect for forty years, because, so far as appears, no demand has been made during that time. This court held, in Terry *v.* Anderson, 95 U. S., 628 (1877), that nine and one-half months was sufficient; in Koshkonong *v.* Burton, 104 U. S., 675 (1881), one year was held sufficient; and in Turner *v.* The People, 168 U. S., 89 (1897), and Timber Co. *v.* Roberts, 177 U. S., 323 (1899), six months was held to be not unreasonable. Why is the limitation of three years unreasonable? The plaintiff in error suggests nothing except the palpable fallacy that as to the rents claimed in the statement of claim filed herein the cause of action for any installment presently due did not arise until the rent was payable, and that it could not be barred before it arose. But the same observation would apply to installments of interest claimed on any debt or demand which had been barred by the Statute of Limitations. The plaintiff in such case might well say, "I am not suing for the principal, but for the interest, and until to-day I never had a right to demand this particular installment, because it had not yet fallen due."

If the rent had been reserved more than twenty years before the passage of the Act, and suit had been brought in 1859, more than three years after its enactment, the bar of the statute could be constitutionally applied if no demand had been made for twenty-one years. Under such facts the question as to the reasonableness of the three-year period and the validity of the retrospective application of the Act would have arisen. But here, as already noted, it is immaterial, because the rent was reserved scarcely more than a twelvemonth before the

passage of the Act, and the whole of the twenty-one years' bar accrued *after* the enactment of the statute.

III. A STATUTE OF LIMITATIONS BARRING THE RIGHT OF ACTION AFTER TWENTY-ONE YEARS' NON-DEMAND OF INTEREST IS CONSTITUTIONAL, ALTHOUGH THE PRINCIPAL ITSELF WAS NOT DEMANDABLE.

The rationale of plaintiff's argument moves to this end that inasmuch as there never was in the case of a ground rent the right to demand the payment of the principal, and as the ground-rent landlord's only remedy is in respect of arrears, no statute can validly bar an action as to future accruing rent; that as the law stood prior to the passage of the Pennsylvania Act of 1855, the principal was not barred by failure to demand interest:

St. Mary's Church *v.* Miles, 1 Wharton, 229 (1835).

and that this law could not be changed by statute, because, as the principal itself is not demandable, failure to demand interest may be consistent with the non-extinguishment of the principal.

This deduction from the body of plaintiff's argument is negatived, however, by the concluding paragraph thereof, in which "plaintiff in error suggests that her wrongs can be righted without any legal disturbance of titles which should be protected. The Legislature meets next January, when a proper Act can be adopted limiting actions *sur* ground rents reserved before 1855." From this it would appear that plaintiff's counsel recognizes the impossibility of successfully contending that no valid Statute of Limitations can be passed in respect of ground rents. Indeed, there would seem to be recognized the perfect propriety of passing a Statute of Limitations which would be retrospective in its operation.

Much of plaintiff's argument is answered by the remark that, notwithstanding the peculiar nature of a ground rent, in that the principal itself is not demandable, yet as the right to the interest necessarily grows out of the non-extinguishment and continued existence of the

principal, the non-payment of the interest may be taken as strong evidence of the extinguishment of the principal. If the ground-rent be paid, there is, of course, no right to demand the interest. If the owner of the ground-rent persists for twenty-one years in his failure to demand interest, it cannot be said that this is no evidence of the actual payment of the ground rent. At any rate, it is an attitude which may be declared, in the exercise of legislative discretion, to be inconsistent with the non-extinguishment of the ground rent.

If this were not so, there could be no valid Statute of Limitations as to ground rents. If twenty-one years' non-payment and non-demand is insufficient; if the Legislature cannot legitimately predicate thereon a bar of the remedy, then two hundred and ten years would also be insufficient. By the simple device of making the interest only, and not the principal demandable, the Statutes of Limitation might be avoided, and legal obligations indefinitely perpetuated. If no interest be paid on account of a judgment bond for twenty-one years the right of action thereon is barred. At common law there was a presumption of fact to this effect, which has by statute been crystallized into a presumption of law. Can it be that the rule would be different if the note did not specifically call for the payment of the principal, or if the principal were not payable until default in a certain number of installments of interest? In the case of a ground rent, at common law, no presumption was indeed raised as to the principal, but there was a presumption of fact that the arrears had been paid. "The lapse of twenty years, without demand or payment is evidence from which a jury may presume payment of the arrears of the ground rent."

Lindeman *v.* Lindsey, 69 Pa., 100 (1871).

The Legislature, in order to protect titles to property and prevent the assertion of stale claims, can, in the exercise of its discretion, say to the owner of the round-rent that he must within twenty-one years make demand of

interest, or it will be conclusively presumed that he had no right to interest, because of the payment of the principal.

> "It is a right founded upon a wise and just policy. Statutes of Limitation are not only calculated for repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses":
>
> Campbell *v.* Holt, 115 U. S., 620.

The deed now in question contains the following proviso:—

> "*Provided always, nevertheless*, that if the said Adam Iseminger, his heirs, or assigns, shall and do at any time hereafter pay or cause to be paid to the said Alexander Osbourn, his heirs or assigns, the sum of $1200, lawful money as aforesaid, and the arrearages of the said yearly rent to the time of such payment, then the same shall forever thereafter cease and be extinguished, and the covenant for payment thereof shall become void. * * *"

At any time within the last forty-eight years the *terre* tenant of this property could, by the payment of $1200, have completely extinguished the ground rent. Indeed, it is highly probable that this was done, although it cannot now be proved.

> "The lapse of twenty years without payment is evidence from which a jury may presume payment of the arrears of ground rent. 'Those only,' says Mr. Price, 'who are accustomed to make or read briefs of title in Philadelphia, going back to the time of the first settlement, know how frequently occur ancient rent charges and ground rents, which the owners of the present day never heard of, and *which generally have nō doubt been honestly extinguished;* while making this note the writer has such a single

brief before him for an opinion, in which no less than three such charges occur as blemishes, grants, or reservations more than a century ago, which no person living has any knowledge of.

" 'The law raises a legal presumption that a mortgage on which interest has not been paid for twenty years has been paid and bars the recovery; and why should a ground rent have a greater immunity against the presumption of extinguishment?'

"It will be observed that all these considerations apply most strongly to existing evils where no payment, claim, or demand has been made for thirty, forty, fifty, or one hundred and fifty years, on account of or for any ground rent, and it was a grievance which, after the lapse of three years, the seventh section of the Act of 1855 was intended to put an end to. The Act was 'to amend certain defects of the law for the more just and safe transmission, and secure enjoyment of real and personal estate.' "

Korn *v.* Browne, 64 Pa., 57 (1870).

While the owner of the ground rent may not demand the principal, yet, if the interest is unpaid, he can pursue the property out of which the rent has issued, by suing for arrears, obtaining judgment, issuing execution thereon, and selling the property. Yet, the owner of the ground rent deliberately sleeps upon his rights, which include a claim against the *corpus* of the estate for twenty-one years, or, as in the case of this plaintiff, for more than forty years.

It is submitted that, notwithstanding the peculiar nature of a ground rent, it is the proper subject of a Statute of Limitations and the failure for twenty-one years to demand any interest, which failure in all human experience would only result from the payment of the principal having in fact been made, may properly be followed by a presumption of the extinguishment of the ground rent.

II.

Substantially the whole of plaintiff's argument is founded on the averment in—

Biddle *v.* Hooven, 120 Pa., 221 (1888),

that this Act "does not impair the title" to the rent, but only takes away the remedy for its recovery. The argument seems to be:—

First.—If you do impair the title the Act is unconstitutional, because it is beyond legislative power to thus affect the obligation of the contract; and

Second.—If you do not impair the title, then the Act is unconstitutional, because it is beyond legislative power to debar a man of his remedy on an unimpaired title.

This, if valid, would be a serious difficulty, for it would render unconstitutional every Statute of Limitations. If, in 1890, A. promises B. to pay him a certain sum of money in one year, and B. brings no suit until 1900, at which time he can prove nothing but the original promise, and its non-fulfilment, that promise still exists, but it is unenforcible. Yet, under the argument above, whether it impairs the contract or debars the recovery on the unimpaired contract, it is equally unconstitutional!

For more than thirty years the Act of 27th of April, 1855, P. L., 368, section 7, has been the settled law of Pennsylvania. Thousands of titles have been accepted on the faith of its enforcement and constitutionality. These facts alone raise a strong presumption in its favor. To erase it from the law of Pennsylvania at this late day would have almost a revolutionary effect upon titles in that State. In practice it has resulted in no inconvenience to the owners of ground rents who are reasonably diligent in enforcing their rights. We know of no case in the Pennsylvania books in which any substantial dispute arose as to whether the non-demand had continued for the statutory period. The Act has been unhesitatingly

and beneficially applied in three reported Pennsylvania cases:

Korn *v.* Browne, 64 Pa., 55 (1870);
Biddle *v.* Hooven, 120 Pa., 221 (1888);
Wallace *v.* Church, 152 Pa., 258 (1893);

besides the case at bar:

Clay *v.* Iseminger, 187 Pa., 108 (1898);
Clay *v.* Iseminger, 190 Pa., 580 (1899).

The opinions in these cases fully vindicate the conclusions reached. We will content ourselves with brief quotations from one case.

In—

Wallace *v.* Church, 152 Pa., 258 (1893),

it was said:—

> "By the Act of 1855 the Legislature provided a limitation for ground rents. It is entitled 'An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate.' The first, second, and third sections relate to the law of descents; the fourth and fifth to proceedings in partition; the sixth to presumptions affecting real estate; the seventh declares 'That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable.'
>
> "This section was not to go into effect until three years after its passage, in order to afford opportunity for those who would otherwise be barred by its provisions to bring an action, or secure an acknowledgment from the owner of the land of the continued existence of the ground rent, annuity, or other

charge, and his liability therefor. There was no other exception or reservation in it. It was intended for the protection of the owner of the land, and to remove stale incumbrances appearing on the records by the application to them of the presumption of an extinguishment by the act of the parties after the lapse of twenty-one years without a legal claim or demand made by the owner of the incumbrance, or an acknowledgment made by the owner of the land bound."

And again:—

"The purpose of the Act of 1855 was to relieve titles and facilitate the sale of real estate. * * * If for twenty-one years no payment upon, or acknowledgment of, the ground rent can be shown and no demand for payment has been made, the Act conclusively presumes a release and extinguishment of the incumbrance by the act of the parties, and declares that the rent shall thereafter be irrecoverable."

The judgment of the Supreme Court of Pennsylvania, it is submitted, should be affirmed.

IRA J. WILLIAMS,
ALEX. SIMPSON, JR.,
For Defendants in Error.